persons who underwent an affected product revision surgery before the CASA was approved were required to file their Orange Form on or before November 4, 2002.

In addition to thoroughly explaining the types of benefits available to Class Members and the procedures for seeking benefits, the CASA described the claims administration and review processes. Specifically, the CASA provides:

- Once a claim has been received by the Claims Administrator, the Claims Administrator must advise the claimant of any deficiencies. The claimant has seventy-five days to cure any deficiencies. See CASA at § 4.6(b).

- No fewer than ninety days after receipt of an acceptable claim form, the Claims Administrator is required to make a Preliminary Determination as to eligibility for benefits. *See Id.* § 4.6(c).

- A class member is entitled to contest Preliminary Decisions within forty-five days from the date of the Preliminary Determination by submitting additional information to support his/her position. *Id.* at § 4.6(d).

- No fewer than ninety days following any supplemental submission, the Claims Administrator must make a Final Determination of whether the class member is entitled to benefits. *Id.* at § 4.6(e).

- Within thirty days of the Final Determination by the Claims Administrator, the class member may appeal that decision to the Special Master by filing a notice with the District Court. *Id.* at § 4.6(f).

- The Class Settlement provides that "Any determination by the special master . . . shall constitute a final and binding determination." *Id.* at § 4.6(g). This provision makes clear that there are no additional appellate remedies.

- The concept of finality is further reflected in the Claims Administrator Procedure (CAP) 30, which provides that unless a class member moves for reconsideration of the Special Master's Decision within five days, "then the Special Master's Decision is final and may not be further contested or appealed."

Claimants who are unhappy with any aspect of the Claims Administrator's determination have several opportunities to seek review. These remedies, however, do not include District Court review of determinations made by the Claims Administrator or the Special Master, or Sixth Circuit review of the District Court's refusal to review Special Master Final Determinations.

3. The Claims Administrator and Special Master Deny Petitioners' Untimely Claims Pursuant to the Terms of the CASA

Petitioners, rather than "opting in" as they claim (Petition at 4), failed to opt out of the settlement, and then submitted an untimely claim for class benefits. While Petitioners argue that their claim forms were submitted prior to the dates payment was to issue (Petition at 4), there is no dispute that Petitioners' claims were untimely according to the carefully-negotiated and judicially-approved claims deadlines set forth in the CASA. Ms. Kane sought to recover under the CASA, and her husband sought derivative benefits. As Ms. Kane admits, her Orange Form was not filed until December 26, 2002 - despite the CASA's requirement that Orange Forms be filed by November 4, 2002.

Petitioners assert that the Claims Administrator summarily dismissed their claims. Petition at 4. To the contrary, the Claims Administrator carefully considered Petitioners' claim before rejecting it pursuant to the CASA's claims procedures. As the first step, the Claims Administrator issued a Preliminary Determination of Settlement Benefits on February 4, 2003 denying Ms. Kane's claim as untimely. Ms. Kane then filed a request for an extension of the filing deadline pursuant to Claims Administrative Procedure

("CAP") 29.[2] In their request for an extension, Petitioners argued that the Claims Administrator was estopped from denying her claim because it had already advanced her $30,000 in payments, and cited the prejudice she would suffer were her claim denied. After considering her request, the Claims Administrator denied it in a May 19, 2003 Final Determination in which it found that Ms. Kane had failed to demonstrate grounds excusing her late filing as set forth in CAP 29. On June 16, 2003, the Claims Administrator issued a similar Final Determination denying Mr. Kane's derivative claim as untimely.

Petitioners then appealed these orders to the Special Master. In their Brief to the Special Master, Petitioners conceded that their claims were 51 days untimely under Section 4.2(a) of the CASA, but argued that the late filing should be excused under the *Pioneer* factors. The Claims Administrator filed a Response to CeCee Kane's Notice of Appeal which argued that the Final Determination should be affirmed under the standards set forth in CAP 29, which essentially incorporates the Fed. R. Civ. P. 60.

On August 11, 2003, the Special Master issued a Notice of Special Master Determination. Petitioners' Appendix at 3a. Far from summarily dismissing Petitioners' claims as Petitioners allege, the Special Master affirmed the following findings made by the Claims Administrator: that Petitioiners submitted untimely Orange, Red and Yellow Forms for relief under the Affected Product Revision Surgery Fund, the Uninsured Affected Product Recipient Fund, and for derivative benefits; that the claims deadlines were an integral and inflexible part of the CASA that could not be abrogated; and that Petitioners did not present facts sufficient to warrant an extension of the filing deadlines for "excusable neglect" under the standards set forth in CAP 29. *Id.* The Special Master's Final Determination included both findings of fact and conclusions of law.

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[2] Paragraph four of CAP 29, which describes the circumstances giving rise to a permissible extension of time, is a literal adoption of the language of Fed. R. Civ. P. 60.

4. The District Court Rejects Petitioners' Efforts to Overturn the Final Decision of the Special Master as Barred by the Terms of the CASA

Having exhausted their avenues of review under the terms of the administrative procedures set forth in the CASA, Petitioners then attempted to appeal the Special Master's August 11, 2003 Determination directly to the Sixth Circuit Court of Appeals, despite the fact that it was not a final district court order capable of sustaining appellate jurisdiction. *See* 28 U.S.C. § 1291. (Appeal No. 03-4519). On October 2, 2003, Petitioners also filed with the District Court a Motion to Enforce Terms Of Class Action Settlement Agreement. That Motion, despite its title, moved the District Court pursuant to Section 9.1 of the CASA to interpret the terms of the CASA so as to allow Petitioners to participate in the Class Settlement despite their untimely filing. That Motion forthrightly declared that it was, in effect, "an **Appeal** to the District Court of the of the [sic] Special Master Determination of August 11, 2003 . . . ." *See* Petitioners' Supplemental Appendix at 21-22, n. 11. That Motion was accompanied by a seventeen-page Memorandum of Points and Authorities in Support of Motion to Enforce Terms of Class Action Settlement Agreement (CASA) and multiple exhibits. In that Memorandum, Petitioners argued that the Special Master had misinterpreted the facts and misapplied the law, and that their untimely claims should be honored under the *Pioneer* analysis or under the doctrine of substantial compliance.

Contrary to Petitioners' assertion, the District Court did not simply conclude it lacked jurisdiction to review the legal conclusions of the Special Master because the CASA "contained no provision authorizing such review." Petition at 5. In a series of three Memoranda and Orders, the District Court set forth the reasons why Petitioners' attempts and others like it seeking further review of Special Master determinations were null and void as contrary to the express language of the CASA and the intent of the parties. Before Petitioners even filed their Motion to Enforce the Terms of the Class Settlement, the District Court had already ruled in a September 18, 2003 Memorandum and Order that the CASA does not provide for additional appeals of Special Master's determinations to either the District Court or the Sixth Circuit

Court of Appeals, and declared all such documents filed with the District Court seeking to appeal or otherwise obtain review of Special Master determination to be null and void. Petitioners' Supplemental Appendix at 4.

In a February 6, 2004 Memorandum and Order, the District Court denied Petitioners' Motion to Enforce the Terms of the Class Settlement in a manner that reiterated and more fully explained its September 18, 2003 ruling. Petitioners' Supplemental Appendix at 7. In its thirty-page analysis, the District Court specifically rejected Petitioners' arguments that the Court should utilize its Section 9.1 powers to excuse Petitioners' late filing under the doctrine of "substantial compliance," or that Petitioners were entitled to District Court review because the Special Master was appointed pursuant to Fed. R. Civ. P. 53. Petitioners then appealed the District Court's February 6, 2004 Memorandum and Order to the Sixth Circuit Court of Appeals on February 18, 2004 (Appeal No. 04-3293).

On February 23, 2004, the District Court issued a third Memorandum and Order denying as void similar efforts by other class members to obtain some form of District Court review of the decisions of the Claims Administrator and Special Master. Petitioners' Supplemental Appendix at 38. On March 10, 2004, Petitioners sought to amend the Notice of Appeal to Case No. 04-3293 to include both the February 23, 2004 Memorandum and Order, and a subsequent Notice of Special Master Determination affirming denial of Extraordinary Injury Fund benefits. (Feb. 20, 2004 Notice of Special Master Determination) (Appeal No. 04-3361).

5. The Sixth Circuit Court of Appeals Denies Petitioners' Appeal as Unauthorized by the CASA

As noted above, Petitioners appealed to the Sixth Circuit: (1) the Special Master's August 11, 2003 Final Decision that Ms. Kane's claims for benefits were untimely (Case No. 03-4519); and (2) the District Court's February 6, 2004 Memorandum and Order denying the Motion to Enforce Terms of Class Action Settlement Agreement (Case No. 04-3293). Petitioners also sought to appeal

the Notice of Special Master Determination denying Extraordinary Injury Fund benefits, and the District Court's February 23, 2004 Memorandum and Order, by amending their Notice of Appeal to Case No. 04-3293.

SOI filed a motion to intervene in the appeals, and the Claims Administrator filed a motion to dismiss. The Sixth Circuit ultimately consolidated Petitioners' appeals with the pending appeals of another member of the settlement class, Linda Mediate. On June 7, 2004, the Sixth Circuit ordered that SOI could proceed as a defendant-appellee, thereby mooting its motion to intervene. All motions to dismiss were referred to the merits panel for review, and a briefing schedule was entered. Petitioners filed an appellate brief on June 24, 2004. SOI and the Claims Administrator each filed appellate briefs July 16, 2004.

Following oral argument September 23, 2004, the Sixth Circuit issued the following Opinion on February 22, 2005:

> Linda Mediate, CeCee Kane, and Joseph P. Kane, plaintiffs in this consolidated appeal, attempted to challenge the district court findings of the Special Master regarding their entitlement to benefits resulting from the multi-district litigation class action Settlement Agreement. The district court refused jurisdiction over their challenge and we AFFIRM that judgment.
>
> The Settlement Agreement between the parties provides the following: (1) a settlement plaintiff may apply for settlement benefits by submitting the required forms to the Claims Administrator; (2) the Claims Administrator will then make a determination regarding the plaintiff's entitlement to benefits; (3) if the plaintiff disagrees with the Claims Administrator's determination, he may file an appeal with the court-appointed Special Master; and (4) "[a]ny determination by the special master . . . shall constitute a final and binding determination."

> Plaintiffs, who were duly entitled to benefits under the Settlement Agreement, were disqualified from receiving such benefits because their attorneys failed to file their forms in a timely manner with the Claims Administrator. Plaintiffs then challenged their disqualification, proceeding through the steps outlined above. The Special Master ultimately denied their challenge, and plaintiffs then sought to appeal that decision to the district court.
>
> The district court properly refused to hear their challenge, explaining that the Settlement Agreement does not provide for an additional appeal of the special master's determination. Plaintiffs' challenge attacks the terms of the Settlement Agreement, and neither this Court nor the district court has the authority to entertain such an attack. *See Brown v. County of Genesee*, 872 F.2d 169, 173 (6th Cir. 1989) (internal quotations omitted) ("[A] court must enforce the settlement as agreed by the parties and is not permitted to alter the terms of the agreement."). We adopt the reasoning and conclusion of the district court, and AFFIRM its judgment.

Petitioners' Appendix at 1e-f.

Petitioners now seek a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

No reasons exist for this Court to grant a writ of *certiorari* to review the judgment of the Sixth Circuit in this case. The Supreme Court Rules make clear that only special circumstances will merit *certiorari* review: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, S. Ct. Rules.

None of the circumstances outlined in Supreme Court Rule 10 that might merit *certiorari* review apply in this case. The Sixth Circuit's Opinion does not conflict with the decision of any other United States Court of Appeals or any state court of last resort. Rule 10(a), S. Ct. Rules. Nor does the Sixth Circuit's judgment decide any important federal issues, much less decide such issues in a manner that conflicts with any decision by this Court or by another court. Rule 10(b), S. Ct. Rules. Nor has the Sixth Circuit in its one-page Opinion so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure so as to call for an exercise of this Court's supervisory power. Rule 10(a), S. Ct. Rules.

The Sixth Circuit simply affirmed the District Court's conclusion that the CASA provided no right to appeal final and binding decisions of the Special Master: The only issues that would be implicated by review of the Sixth Circuit's well-reasoned but unremarkable opinion would be those of contractual interpretation of this particular class action settlement agreement.

1. The Sixth Circuit's Opinion Conflicts in No Way With the Eleventh Circuit's Opinion in *Turner v. Orr.*

Petitioners claim that the Sixth Circuit's Opinion in this case conflicts with the Eleventh Circuit's analysis in *Turner v. Orr*, 722 F.2d 661 (11th Cir. 1984). Petition at 5. Petitioners are wrong. The Sixth Circuit's analysis in this case is perfectly consistent with the Eleventh's Circuit's analysis in *Turner* – in both cases the courts looked at the language of the class settlement and the intent of the parties to construe the meaning of the settlement agreement. The fact that the Eleventh Circuit in *Turner* ultimately arrived at a

different conclusion than the Sixth Circuit in this case is due wholly to the difference in the underlying facts in these cases, not due to the application of some conflicting rule of law.

The "sole issue" in *Turner* was whether the "Special Master" appointed pursuant to the consent judgment between the parties was a Special Master whose decisions were intended to be final and binding, or a Special Master appointed pursuant to Fed. R. Civ. P. 53 whose decisions were subject to district court review. *Id.* at 662. The Eleventh Circuit in *Turner* reversed the district court and found that the Special Master *was* a Rule 53 Special Master, but did so based on case-specific facts that in no way conflict with the analysis of the Sixth Circuit or the District Court in this case.

In this case, the District Court's painstaking analysis of the Rule 53 issue demonstrates why the facts in this case compelled a different conclusion than that reached by the Eleventh Circuit in *Turner*. In its February 6, 2004 Memorandum and Order affirmed by the Sixth Circuit, the District Court carefully considered and utterly rejected Petitioners' contention that Rule 53 compelled district court review of Special Master decisions:

> The flaw in this argument is that the position of the Special Master that was created by the Settlement Agreement is not the same as the position of Special Master discussed in the Federal Rules of Civil Procedure. Neither the parties nor the Court ever contemplated any possibility of an appeal being taken by any party (whether a plaintiff or defendant) from the benefits determination of the Special Master appointed under the Settlement Agreement. Indeed, the parties designed the entire claims administration process with the specific goal of avoiding the involvement of any court with benefit determinations.

Petitioners' Supplemental Appendix at 27-28 (emphasis in original).

The District Court rejected the Rule 53 argument for several well-considered, factually-supported reasons. First, the District Court noted that nothing in the CASA refers to Rule 53, and that the District Court never invoked Rule 53. *Id.* at 28-29. To the contrary, the District Court observed that it had appointed the Special Master not pursuant to Rule 53, but rather pursuant to Section 4.6(g) of the CASA, which provides: "Class Counsel together with the Special State Counsel Committee shall appoint a Special Master (subject to the approval of the Court) to make a determination with respect to such Final Determination." *Id.* at 28.

The District Court further reasoned that the Special Master was not a Rule 53 Special Master because his appointment was inconsistent with the procedural requirements of Rule 53. Specifically, the District Court noted that it did not itself appoint the Special Master as required by Rule 53, but merely confirmed the appointment of the Special Master by counsel as mandated by the CASA. *Id.* at 28-29. Nor did the District Court enter an "order of reference" specifying or limiting the powers of the Special Master as required by Rule 53. *Id.*

More fundamentally, the District Court, relying on its oversight of the settlement negotiations, observed that the interpretation of the Special Master as a Rule 53 Special Master would be absolutely inconsistent with the intent of the parties to bypass the judiciary and to create a finite and efficient claims administration process:

> Indeed, it was precisely because the parties wanted to avoid the involvement of this or any other Court with benefit determinations that they explicitly agreed the Special Master's decision would be "a final and binding determination" of benefits. Settlement Agreement § 4.6(g) (emphasis added). There is, of course, no appeal from a "final and binding determination," and the parties negotiated for precisely this result. As designed, the claims administration process provided a mechanism to quickly and fairly compensate deserving plaintiffs commensurate with their injuries, with several levels of review. Once important aspect of this design was that

> the Claims Administrator would know the entire universe of claims within a certain time period; until the universe was known, he could not make various benefit determinations and payments. Kane's insistence that she should be allowed to "appeal the Special Master's determinations to this Court (or the Sixth Circuit Court of Appeals) is to insist that the Claims Administrator delay these payments to other class members indefinitely. This is not the deal that counsel designed, or to which the parties, including Kane, agreed.

Id. at 29.

The District Court further noted that SOI's subsequent behavior further supported the conclusion that the parties never intended the Special Master to be a Rule 53 Special Master. Although Rule 53 grants both defendants and plaintiffs the right to seek district court review of Special Master determinations, the District Court was quick to observe that SOI had never sought district court review of any final Special Master determination. *Id.* at 29-30.

The District Court finally observed that to accept Petitioners' position that the Special Master is a Rule 53 Special Master would be to "literally open the floodgates of legal claims." *Id.* at 30-31. Such an interpretation would undermine the precious certainty and finality desired by all parties and memorialized in the claims administration procedures set forth in Section 4 of the CASA. Any class member whose claims had been denied, or even any class member whose claims had been approved but wanted more benefits, would be allowed to swamp the courts with appeals, tie up the settlement resources, and diminish the settlement funds. *Id.* Based on this exhaustive analysis, the District Court concluded that Rule 53 was inapposite:

> In sum: (1) the Special Master appointed by counsel pursuant to the Settlement Agreement was not appointed by the Court pursuant to Rule 53 and (2) the Special Master's determinations

> are not appealable to this Court under Rule 53 or the Settlement Agreement."

Id. at 31.

The differences between the operative facts of this case and those underlying the Eleventh Circuit's analysis in *Turner* could not be more striking: First, the Eleventh Circuit found that the district court in *Turner* erred by relying on the testimony of counsel for plaintiffs that the parties never intended to provide a right to appeal, where plaintiffs had in fact previously appealed special master decisions to the district court. 722 F.2d at 665. In contrast, SOI has, as found by the District Court, never attempted to appeal any decision by the Special Master. Such behavior is entirely consistent with the conclusion that the parties never intended the Special Master to be a Rule 53 Special Master.

Second, the district court in *Turner* erred by failing to credit the opposing testimony of the defendants that the parties did indeed intend for there to be a right of appeal. *Id.* In this case, Petitioners could point to no countervailing testimony of the parties' intent. To the contrary, the District Court in its February 23, 2004 Order concluded that, based on the settlement history, the parties had intended to avoid such judicial entanglements:

> The parties were in complete agreement that this claims administration process should be completely extra-judicial; the parties believed that, given the extreme volume of work involved and the need to satisfy precise deadlines, the timing of any judicial process would be too uncertain.

Petitioners' Supplemental Appendix at 19.

Third, the district court in *Turner* erred in relying on ambiguous settlement terms that may or may not have limited the parties appellate rights. 722 F.2d at 664-65. In this case, the Sixth Circuit affirmed the District Court's conclusion that CASA § 4.6(g) is unambiguous:

> The Settlement Agreement between the parties provides that: (1) a settling plaintiff may apply

> for settlement benefits by substituting the required forms to the Claims Administrator; (2) the Claims Administrator will then make a determination regarding the plaintiff's entitlement to benefits; (3) if the plaintiff disagrees with the Claims Administrator's determination he may file an appeal with the court-appointed Special Master; and (4) "[a]ny determination by the special master . . . shall constitute a final and binding determination." Settlement Agreement § 4.6(g). . . . The Settlement Agreement does NOT provide for an additional appeal of the special master's determination to this Court. Nor does it provide an additional appeal of the special master's determination to the Sixth Circuit Court of Appeals.

Petitioners' Appendix at 1e-f.

The operative facts driving the decisions in these cases could not be more different. Each case involves different contractual language, different settlement and procedural histories, and different underlying facts. These decisions conflict no more than one decision holding one contract to mean one thing in one context conflicts with another decision finding a different contract to mean something different in another context.

2. This Petition Raises No Issues Regarding the Application of Fed. R. Civ. P. 53 or Any Other Federal Rules or Issues.

Petitioners also insinuate that the Sixth Circuit's Opinion raises issues regarding the interpretation and application of Rule 53 of the Federal Rules of Civil Procedure. But it does not. The relevant issue which the Sixth Circuit addressed was not *how* Rule 53 is to be applied, but *whether* Rule 53 is to be applied, which is nothing more than an issue of contractual interpretation. Petitioners boldly assert that there is "no question that the Special Master in this case was a Rule 53 Special Master under *Turner*, and that the District Court had an obligation under Rule 53 to

review his legal determinations." Petition at 6. But neither the District Court nor the Sixth Circuit agreed with Petitioners' position. The Sixth Circuit's opinion in no sense implicates Rule 53 or its application, or indicates that questions of law determined by a Rule 53 Special Master are not reviewable by the District Court. The point of the District Court and the Sixth Circuit's analysis is that Rule 53 and its application are *not* implicated by the controlling terms of the CASA. Nor are any other issues of federal law.

No ruling before this Court interprets or applies Fed. R. Civ. P. 53. The sole issue is whether the District Court, which oversaw and approved the class settlement from start to finish, abused its discretion in determining that the Special Master appointed by the parties was not a Rule 53 Special Master or by interpreting the CASA so as to prohibit any right of appeal to the District Court. This Petition presents no relevant federal issues.

3. The Sixth Circuit's Opinion Does Not Conflict with Other Decisions Applying the *Pioneer* Analysis.

Nor does the Sixth Circuit's analysis conflict in any sense with "the decisions of multiple circuits holding that the determination of whether to allow participation of late claimants in a class action is essentially an equitable decision within the discretion of the Court." Petition at 3. In none of those decisions had the parties agreed to delegate that determination to the final and binding determination of a Special Master. It is unchallenged that the district court is typically invested with the discretion to determine whether late claimants should nonetheless be allowed to recover pursuant to the "Pioneer Factors" set forth in *Pioneer Inv. Servs. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1983). But it is equally unchallenged that parties to a class action settlement agreement may agree to conclusively delegate that discretion to a third party such as a Special Master. It is also unchallenged that the Claims Administrator and the Special master *did* apply the Rule 60(b) *Pioneer* factors pursuant to CAP 29 to determine whether Petitioners should be allowed to recover class benefits notwithstanding their untimely filings.

What Petitioners omit is the fact both the Claims Administrator and the Special Master *did* apply the *Pioneer* factors to Petitioners' untimely claims and determined that the facts did not merit allowing their untimely claims. Petitioners cannot fault the standards applied to determine whether their untimeliness should be excused. Petitioners' sole complaint is that they do not like the *result* of the Claims Administrator and Special Master's *Pioneer* analysis, and now wish to speak to someone else. But, as the Sixth Circuit and the District Court found, the express terms of the Class Action Settlement Agreement prohibit such additional review.

The application of the *Pioneer* factors is in no way implicated by the Sixth Circuit's opinion. The only orders before the Sixth Circuit for review were the series of District Court Orders declining to review the final determination by the Special Master. At no point did the District Court reach the issue of the merits of the Special Master's final determination, and at no point did the District Court issue any "final decision" on the merits of that issue capable of sustaining appellate jurisdiction. *See* 28 U.S.C. § 1291. While Petitioners purported to appeal the merits of the Special Master's final determination denying their claim for benefits as untimely as a "de facto" district court decision, there is no support for that summary assertion, and the Sixth Circuit understandably did not reach the issue of whether the Special Master erred in its application of the *Pioneer* factors.

4. The Petition Raises No Important Issues Regarding the Equitable Responsibility of the District Court to Entertain Review of Administrative Proceedings.

Petitioners also assert that the District Court abdicated its duty to review class appeals from Special Master determinations, and that the Sixth Circuit abdicated its duty to require the District Court to do so. Petition at 5. Petitioner maintains that Section 9.1 of the CASA's reservation of jurisdiction required the District Court to entertain review of appeals from Special Master decisions and to excuse Petitioners' untimely filings. Petition at 8. Section 9.1 provides that:

> The Court shall retain exclusive and continuing jurisdiction of the Complaint, the Parties, all Class Members (other than a Class Member who exercises an Opt-Out Right pursuant to Section 3.8), Sulzer, Sulzer AG, and the other Released Parties, and over this Settlement Agreement with respect to the performance of the terms and conditions of the Settlement Agreement, to assure that all disbursements are properly made in accordance with the terms of the Settlement Agreement, and to interpret and enforce the terms, conditions, and obligations of this Settlement Agreement.

See Petitioners' Supplemental Appendix at 26-27 (*quoting* CASA at § 9.1).

But the District Court had already fully addressed this argument in its February 6, 2004 Memorandum and Order in which it concluded that Section 9.1 empowers it to only enforce the terms of the CASA as written, not to abrogate agreed-upon provisions for the benefit of untimely filers to the detriment of the rest of the class:

> But this provision weighs against Kane, not for her. The deadlines that Kane (and other claimants) seek to avoid are important "terms and provisions" that were carefully and explicitly negotiated by the parties. The Court must enforce these deadlines as written, if it is to "assure that all disbursements are properly made in accordance with the terms of the Settlement Agreement." Thus the Court rejects the argument that claimants should be allowed to obtain benefits under the Settlement Agreement, even though they did not comply with its critical terms.

Petitioners' Supplemental Appendix at 27 (emphasis in original).

By the same analysis, the District Court could no more have used Section 9.1's power to enforce the terms of the CASA to

create a right of review of Special Master determinations in derogation of Section 4.1 than it could have used Section 9.1 to suspend the filing deadlines as requested by Petitioners. The Sixth Circuit specifically affirmed the District Court's refusal to accept Petitioners' invitation to use Section 9.1 to rewrite the substantive terms of the CASA:

> Plaintiffs' challenge attacks the terms of the Settlement Agreement, and neither this Court nor the district court has the authority to entertain such an attach. *See Brown v. County of Genesee*, 872 F.2d 169, 173 (6th Cir. 1989) (internal quotations omitted) ("[A] court must enforce the settlement as agreed by the parties and is not permitted to alter the terms of the agreement . . . .").[3]

Petitioners' Appendix at 1f.

What Petitioners mischaracterize as the exclusion "of a permanently injured class member and scores of others similarly situated . . . from a class action created for their benefit without judicial review" (Petition at 8) is in reality simply the enforcement of the negotiated and judicially approved terms of the CASA as written to protect the rights of the vast majority of class members who filed timely claims, and the preservation of the integrity of the claims administration process against Petitioners' attack. The alternative would be to devolve into precisely the morass of litigation the parties intended to avoid through these provisions. Indeed, the District Court forecast that granting Petitioners the relief they seek would "literally open the floodgates of legal claims." Petitioners' Supplemental Appendix at 30-31.[4]

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[3] Petitioners incorrectly argue that the Sixth Circuit erred in relying on *Brown v. Gillette*, 723 F2d 192 (1st Cir. 1983). Petition at 7. The decision relied upon by the Sixth Circuit in its Opinion is *Brown v. County of Genesee*, 827 F2d 169 (6th Cir. 1989). Petitioners' Appendix at 1f.

[4] In its Orders the District Court noted the proliferation of "appeals" seeking District Court review of Special Master determinations in some form or another. Petitioners' Supplemental Appendix at 30-31. A dozen more related appeals noticed to the Sixth Circuit followed this case, and more would inevitably

Petitioners assert that "[I]nterpretation is not alteration or attack." Petition at 6. But Petitioners' proffered "interpretation" is indeed an untimely collateral attack on the viability of the CASA where no such "interpretation" of the plain language of Section 4.6 is required, and, if it were, such a counterintuitive "interpretation" of the term "final and binding" to mean "final and appealable" would contradict the intent of the parties to avoid the type of lengthy appeals such an "interpretation" would allow.

Petitioners do not allege any due process violations. Petitioners do not claim that any particular aspect of the CASA or its application to their claims is so arbitrary and capricious as to deny them due process. They simply disagree with the District Court's conclusion that Section 9.1 of the CASA compels it to enforce the terms of the CASA as written, which precludes further review of final and binding decisions of the Special Master pursuant to Section 4.1 of the CASA. Again, Petitioners' point devolves to a simple issue of contractual interpretation.

Indeed, any decision that failed to give effect to the plain language of the parties' express contractual agreement through Section 4.1 of the judicially approved and unchallenged CASA that final decisions of the Special Master would be "final and binding" would contravene the well-established line of authority from this Court and other courts denying courts the authority to rewrite the terms of parties' settlement agreements.[5] The District Court recognized this in denying Petitioners' requests for review:

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have followed had the Sixth Circuit not closed the floodgates. *See* Appeal Nos. 04-3222; 03-4325; 03-4518; 04-3360; 04-3375; 04-3374; 04-3376; 04-3127; 04-3359; 04-3385; 04-3421.

[5] *Evans v. Jeff D.*, 475 U.S. 717, 726, 106 S. Ct. 1531, 1537 (1986) ("Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection"); *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir. 1988) (holding that the judiciary must enforce the terms of a settlement agreement "as agreed by the parties and is not permitted to alter the terms of the agreement"); *In re: Southern Ohio Correctional Facility*, 191 F.3d 453 (Table), 1999 WL 775830 (6th Cir. 1999) (holding district court was not empowered to modify provisions of class action settlement agreement); *Brooks v. Georgia State Bd. Of Elections*, 59 F.3d

> Now, however, may claimants ask the Court to do what the law expressly says it may not do – "delete, modify or substitute certain provisions" contained in the Settlement Agreement, because those provisions are in some way "unfair" as applied to them.

Petitioners' Supplemental Appendix at 34. Indeed, the Sixth Circuit explicitly recognized this controlling line of authority in its Opinion by citing *Brown v. County of Genesee*, 872 F.2d 169. Petitioners' Appendix at 1f.

1114, 1120 (11th Cir. 1995) (holding that the judiciary lacked "the power to *modify the effective dates* in the proposed settlement agreement.") (emphasis added); *Walitalo v. Iacocca*, 968 F.2d 741, 750 (8th Cir. 1992) (holding that "[b]y imposing liability . . . for expenses not within the definition of 'costs,' the court impermissibly altered the parties' settlement agreements."); *Cotton v. Hinton*, 559 F.2d 1326, 1333 (5th Cir. 1977) (explaining that the judiciary is "not free to delete, modify, or substitute certain provisions of the settlement. The settlement must stand or fall as a whole."); *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989) ("[C]ourts are not permitted to modify settlement terms or in any manner to rewrite agreements reached by parties."); *In re Warner Comms. Secs. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) ("[I]t is not a district judge's job to dictate the terms of a class settlement; he should approve or disprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms.").

CONCLUSION

Respondent SOI respectfully requests that this Court deny Petitioners' Petition for a writ of *certiorari*. This Petition does not, as Petitioners claim, raise issues of "exceptional importance in the future of class actions nationwide." Petition at 9. The reviewability of Special Master decisions in class settlements will continue to turn on the specific language and intent of the parties as memorialized in the settlement agreement, not upon any sweeping rule of law. This Petition raises nothing more than the Sixth Circuit's sound, but unremarkable Opinion affirming the District Court's interpretation of this particular Class Action Settlement Agreement.

Respectfully submitted,

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Dated: December 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via first-class mail this 29th day of December, 2005 to the following:

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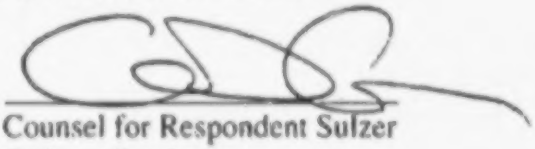

Counsel for Respondent Sulzer
Orthopedics Inc.

No. 05-678

IN THE

Supreme Court of the United States

CeCEE C. KANE AND JOSEPH P. KANE,

Petitioners,

v.

SULZER SETTLEMENT TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JAMES J. MCMONAGLE, AS CLAIMS ADMINISTRATOR

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QUESTION PRESENTED

Whether a class member in a class action settlement may, after the time for objection to the proposed settlement has lapsed, and after the time for appealing from the trial court's order approving the settlement has lapsed, seek to undo the court approved settlement agreement's procedures for administering claims for settlement benefits?

PARTIES TO THE PROCEEDING

Petitioners Kane are Class Members of the certified class in *In re Sulzer Hip Prosthesis and Knee Prosthesis Products Liability Litigation*, MDL No. 1401 (United States District Court, Northern District of Ohio, Eastern Division, Case No. 1:01-CV-9000) whose applications for benefits pursuant to the Settlement Agreement in that class action were deficient and ineligible.

Respondents include the Claims Administrator, James J. McMonagle, for the Sulzer Settlement Trust, who is required, pursuant to the terms of the Settlement Agreement, to receive, review, and pay benefits to eligible class members from the Sulzer Settlement Trust.

Respondents also include Sulzer Orthopedics Inc. ("Sulzer"). Since approval of the Settlement Agreement, Sulzer was renamed Centerpulse, Inc., which was subsequently purchased by Zimmer, Inc. For purposes of consistency, Respondent Sulzer is identified, in this brief in opposition, as "Sulzer."

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TABLE OF CITED AUTHORITIES

Respondent Claims Administrator James J. McMonagle respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari, filed by Petitioners Cecee and Joseph Kane, to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, filed on February 22, 2005 (App. 1a) and May 7, 2005 (App. 2a).

OPINIONS BELOW

Petitioners Kane have included in their Appendix and Supplemental Appendices the opinions from the District Court (February 6, 2004) (Supplemental App. 7), and the Circuit Court of Appeals (February 22, 2005), 398 F.3d 782 (6th Cir. 2005) (App. 1e).

STATEMENT OF THE CASE

On March 13, 2002, the U.S. District Court for the Northern District of Ohio ("District Court") preliminarily approved, pursuant to F.R.C.P. 23(b)(3), a class action settlement ("Settlement Agreement") in *In re Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation*, MDL No. 1401. A comprehensive notice campaign ensued and the Court conducted a Fairness Hearing on May 6, 2002. No objector appeared at the Fairness Hearing. Petitioners did not object to the Settlement Agreement and did not exercise their right to opt out of the Settlement.

On May 8, 2002, the District Court approved the Settlement Agreement as fair and adequate and comporting with the requirements of F.R.C.P. 23. On June 4, 2002, the District Court entered an order formally approving the Settlement Agreement and implementing the Settlement Agreement's requirements enjoining non-opt-out litigation.

No person or Class Member, including Petitioners, objected to the Court's June 4, 2002 order. No person or class member, including Petitioners, noted an appeal from the June 4, 2002 Trial Court Approval Order and, in accord with applicable rules of appellate procedure and the terms of the Settlement Agreement, the Settlement Agreement received Final Judicial Approval on July 8, 2002.

In reliance upon the Settlement Agreement having received Final Judicial Approval, Sulzer fully funded the Sulzer Settlement Trust, with $1.045 billion, as required by the Settlement Agreement. In reliance upon Final Judicial Approval, Sulzer also made subsequent fundings to the Sulzer Settlement Trust as required by the Settlement Agreement. In reliance upon Final Judicial Approval, the Claims Administrator, James J. McMonagle, received, reviewed, processed, and paid Claims for Settlement benefits, as required by the Settlement Agreement.

To date, the Claims Administrator has processed more than 19,000 Claims for Settlement benefits from more than 11,000 Claimants. Those applications have, in turn, resulted in the Claims Administrator's payment of more than $964 million in Settlement benefits to more than 10,000 Class Members.

The parties to the Settlement Agreement made detailed and careful provision for the administration of claims for Settlement benefits. These provisions included:

1. Prescribed forms for submitting Claims for Settlement benefits.

2. The Claims Administrator's "completeness" review of a benefit application to determine whether a Claimant's submission was deficient and to give notice to the Claimant of the deficiency before any benefit determination was made.

3. Following a notice of incompleteness or deficiency, the Claimant's opportunity to supplement with new evidence or argument a Claim to show why an incomplete or deficient Claim should be awarded benefits.

4. After deficiency notice and opportunity to cure, the Claims Administrator's issuance of a Preliminary Determination of Settlement benefits.

5. After receipt of an adverse Preliminary Determination, the Claimant's opportunity, again, to contest the adverse Preliminary Determination by providing new evidence or argument regarding his Claim.

6. After reviewing any contest to the Preliminary Determination, the Claims Administrator's issuance of a Final Determination of Settlement benefits.

7. After receiving an adverse Final Determination of Settlement benefits, Claimant's opportunity to appeal that Final Determination to a party-appointed special master for a "final and binding" determination of Settlement benefits.

Settlement Agreement § 4.6. In addition, the Claims Administrator, with the approval of Class Counsel and the Special State Counsel Committee, and in the manner ordered by the District Court, adopted processing guidelines governing the receipt and payment of late Claims (Claims Administrator Procedure 29). Claims Administrator Procedure 29 adopted the guidelines for receiving late submissions prescribed in F.R.C.P. 60, this Court's decision in *Pioneer Invest. Srvcs. Co v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380 (1993), and applicable law from the U.S. Court of Appeals for the Sixth Circuit. Petitioners Kane availed themselves of the Claims Administration process contemplated by the Settlement Agreement.

Notwithstanding, however, the clear requirement that the party-appointed special master's benefit determination was to be "final and binding," Settlement Agreement § 4.6(g), Petitioners Kane sought review of the adverse final decision from the party-appointed special master by the District Court. That review, had it happened on its merits, would have rendered the terms "final and binding" in the Settlement Agreement nullities inasmuch as the administrative process would have concluded in a determination that was neither final nor binding. The Settlement Agreement plainly and explicitly prescribed the claims administration process described above. It contained no provision for a post-administrative process review because no post-administrative process would be necessary for determinations that are "final and binding."

Upon review of the Petitioners' challenges to the results of the administrative process contemplated by the Settlement Agreement, the District Court ruled that Petitioners had exhausted their claims administration opportunities when

they sought, and received, review by the party-appointed special master. The District Court further ruled that no further review of a Settlement determination, after the party-appointed special master's review, was permissible and therefore declined to review the party-appointed special master's determination on its merits. District Court's February 6, 2004 Memorandum and Order (Supplemental App. 7). The District Court reasoned:

1. that the parties to the Settlement Agreement had reasonably crafted exhaustive claims administration procedures;

2. that they had reasonably elected that those administration procedures occur administratively so as to maximize their efficiency while minimizing Class Members' and the Trusts' transactional costs;

3. that those administrative procedures were intended to vindicate Class Members' reasonable expectations of opportunities to cure deficient Claims;

4. that review of administrative decisions in the District Court would undercut and contradict the purposes and provisions of the Settlement Agreement's explicit administration processes;

5. that the Settlement Agreement's administration processes had been approved by the Court in an order that had not, at least in that respect, been the subject of any objection and

not in any respect the subject of an objection by Petitioners;

6. that District Court's order approving the Settlement Agreement had not been the subject of any timely appeal and its provisions, including its provisions pertaining to the prescribed claims administration process, could not be collaterally attacked years after becoming final;

7. that the District Court did not have the authority to approve in part and disapprove in part the class action Settlement Agreement negotiated by the parties; and

8. that by denying Petitioners review of their administrative decision in the District Court, the District Court was properly exercising its continuing jurisdiction under the terms of the Settlement Agreement to implement the Settlement Agreement as agreed by the parties and approved by the District Court.

District Court's February 6, 2004 Memorandum and Order. (Supplemental Appendix at 7).

Petitioners sought review of the District Court's February 6, 2004 Order in the U.S. Court of Appeals for the Sixth Circuit. By unanimous opinion, a panel of the U.S. Court of Appeals affirmed the District Court's opinion and explicitly adopted its reasoning. (App. 1e). The U.S. Court of Appeals denied Petitioners' Petition for Rehearing *En Banc*. (App. 2a). Petitioners now seek review in this Court.

REASONS FOR DENYING THE PETITION

Rule 10 of the Rules of the Supreme Court of the United States guides this Court's consideration of whether to award a writ of *certiorari*. Petitioners do not expressly invoke Rule 10(a), but its provisions are the sole basis contemplated by Rule 10 that may be applied to the present Petition. The decision below is neither in conflict with the decision of another United States Court of Appeals on the same important matter, nor does the decision below so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Sup. Ct. R. 10(a).[1] Petitioners' challenge amounts to one of contract interpretation with no significant precedential value beyond the administration of this single class action settlement.

Petitioners' principal argument is that the adverse decision rendered by the party-appointed special master in this case ought to have been reviewed by the District Court. As a threshold matter, this question is not an "important matter" that is an appropriate issue for review by this Court. Party-appointed special masters in class actions are exceedingly rare. Indeed, Petitioner has pointed to no case anywhere before or since this case wherein the parties to a class action settlement agreement agreed to appoint, themselves, a special master for purpose of concluding a benefit determination. While that process is obviously important to the Sulzer Settlement Trust and to the efficient and orderly administration of the present class action

1. Sections (b) and (c) of Rule 10 are inapplicable to this case because no ruling of a state court is at issue here. Petitioners do not argue otherwise.